Mazlani bin Mansor v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-05–181 OF 2010, W-05–182 OF 2010 AND W-05–183 OF 2010
ABDUL MALIK ISHAK, CLEMENT SKINNER AND AZAHAR MOHAMED JJCA
17 OCTOBER 2013

Criminal Procedure — Trafficking in dangerous drugs — Proof of case beyond reasonable doubt — Whether case against accused proved beyond reasonable doubt — Whether circumstances in which drugs were found showed accused had knowledge of existence of drugs and had common intention to traffic in same

The appellants were convicted and sentenced to death by the High Court for jointly trafficking in 108,796g of cannabis at the first appellant's house. The appellants were found either standing or sitting near several bags and sacks containing the drugs in the kitchen of the house when a police party raided the premises. The appellants contended that the raid happened shortly after they had arrived at the house so that the second and third appellants could wait for the first appellant to bathe and change his clothes before all of them went out for supper. The appellants said they had no knowledge about the existence of the cannabis in the house and contended that the trial judge erred in finding them to have been in possession of the drugs even though others, such as the first appellant's wife, PW10, and the appellant's worker, Suratman, and the latter's friends had access to the place. The prosecution, they said, failed to exclude Suratman and PW10 from possession of the cannabis. The appellants said that simply because they were physically close to the drugs when the police raided the premises could not, of itself, mean they had custody, control and possession of the same in the absence of any overt action on their part to fasten them with knowledge of the drugs.

Held, dismissing the appeals and confirming the convictions and sentences:

(1) The prosecution had discharged its obligation to exclude PW10 from possession of the cannabis. There was no evidence to suggest or infer PW10 had possession of the cannabis or had anything to do with the drugs. She testified that when she left the house to go to the night market, the sacks containing the drugs were not there, but on her return she saw four sacks in the kitchen but did not examine them or know anything about them. She said she fed the children and went to sleep and it was only when she heard the door of the house being kicked open that she came out of her room and saw the police. PW10's evidence on the matter

was never challenged. It was also never put to her or to any of the police witnesses that she had placed the four sacks in the kitchen or had custody of them (see paras 19–20).

(2) The prosecution had no obligation to exclude Suratman from possession of the cannabis. PW10 did not identify him as the person who had a key to the house. All she said was that her husband's worker had a key. The name 'Suratman' was never put to PW10. It was also never put to any of the police witnesses that the worker referred to was Suratman; that he had access to the house or that he was the one who had placed the sacks containing the drugs in the kitchen. It was only after the prosecution had closed its case and whilst the first appellant was testifying that the name 'Suratman' surfaced. The first appellant admitted he had never told the police about Suratman. As Suratman's identity was kept up the sleeves of the first appellant until the defence was called, there was no basis to say the prosecution ought to have called Suratman to exclude him from possession of the cannabis (see paras 19, 21–22).

(3) Given the circumstances surrounding the recovery of the cannabis — the finding of the appellants late at night behind closed doors in the presence of a very large quantity of the drugs — the correct irresistible inference was that the appellants were so situated to the cannabis that they had the power to deal with it as owners to the exclusion of all other persons and intended to do so if the need arose. The circumstances also gave rise to the inference that the appellants had a common intention to traffic in the drugs pursuant to a pre-arranged plan and that they were not at the house to consume the drugs themselves (see paras 28 & 31).

[Bahasa Malaysia summary

Defendan-defendan disabitkan dan dihukum mati oleh Mahkamah Tinggi kerana bersama mengedar kanabis sebanyak 108,796g di rumah perayu pertama. Perayu-perayu didapati sama ada berdiri atau duduk berdekatan beberapa beg dan karung yang mengandungi dadah di dapur rumah tersebut apabila pasukan polis menyerbu premis tersebut. Perayu-perayu berhujah bahawa serbuan terjadi sebaik saja mereka tiba di rumah tersebut dengan itu perayu-perayu kedua dan ketiga boleh menunggu untuk perayu pertama mandi dan menukar pakaiannya sebelum mereka keluar untuk makan malam. Perayu-perayu menyatakan mereka tidak mengetahui mengenai kewujudan kanabis di dalam rumah dan berhujah bahawa hakim perbicaraan tersilap dalam mendapati mereka mempunyai milikan dadah tersebut walaupun orang lain seperti isteri perayu pertama, PW10, dan pekerja perayu, Suratman, dan rakan-rakan perayu mempunyai akses kepada tempat tersebut. Pihak pendakwaan, mereka berhujah, gagal untuk mengetepikan Suratman dan PW10 daripada milikan kepada kanabis tersebut. Perayu-perayu menyatakan hanya kerana mereka berada terlalu dekat secara fizikal kepada dadah tersebut apabila polis menyerbu premis tersebut tidak dapat, dengan itu, bermaksud

mereka mempunyai jagaan, kawalan dan milikan kepadanya tanpa apa-apa tindakan terang-terangan oleh mereka untuk mengatakan mereka mempunyai pengetahuan tentang dadah tersebut.

Diputuskan, menolak rayuan-rayuan dan mengesahkan sabitan dan hukuman:

(1) Pihak pendakwaan telah melepaskan tanggungjawabnya untuk mengecualikan PW10 daripada milikan dadah tersebut. Tiada keterangan untuk mencadangkan atau membuat kesimpulan PW10 mempunyai milikan atau mempunyai apa-apa kaitan dengan dadah tersebut. Dia memberi keterangan yang apabila dia meninggalkan rumah untuk ke pasar malam, karung-karung mengandungi dadah tidak berada di situ, tetapi apabila dia pulang ke rumah dia nampak empat karung di dalam dapur tetapi tidak memeriksanya atau mengetahui apa-apa tentangnya. Dia memberi anak-anak makan dan tidur dan hanya apabila dia dengar pintu rumah ditentang kuat membuatkan dia keluar daripada biliknya dan nampak polis. Keterangan PW10 atas perkara tersebut tidak dicabar. Ia juga tidak dikatakan kepadanya atau kepada mana-mana saksi polis yang dia telah meletakkan empat karung tersebut di dapur atau mempunyai jagaan terhadapnya (lihat perenggan 19–20).

(2) Pihak pendawaan tidak bertanggungjawab untuk mengecualikan Suratman daripada milikan kanabis tersebut. PW10 tidak memberi keterangan mengenainya sebagai seorang yang mempunyai kunci kepada rumah tersebut. Apa yang dia katakan hanya pekerja suaminya mempunyai kunci. Nama 'Suratman' tidak pernah diajukan kepada PW10. Ia juga tidak pernah diajukan kepada mana-mana saksi polis yang pekerja dirujuk adalah Suratman; yang dia mempunyai akses kepada rumah tersebur atau yang dialah orang yang meletakkan karung-karung yang mengandungi dadah di dalam dapur. Ia hanya selepas pihak pendakwaan menutup kesnya dan semasa perayu pertama memberi keterangan baru nama 'Suratman' berbangkit. Perayu pertama mengaku yang dia tidak pernah emmberitahu polis mengenai Suratman. Memandangkan identiti Suratman tidak dinyatakan oleh perayu pertama sehingga pembelaan dipanggil, tiada asas untuk menyatakan pihak pendakwaan sepatutnya memanggil Suratman untuk mengetepikannya daripada milikan kanabis tersebut (lihat perenggan 19, 21–22).

(3) Mengambil kira keadaan sekeliling terhadap penemuan kanabis tersebut — mendapati perayu-perayu pada lewat malam di belakang pintu tertutup dalam kewujudan kuantiti besar dadah — inferens tidak dapat ditahan yang betul adalah perayu-perayu berada berdekatan kanabis yang mereka mempunyai kuasa untuk berurusan dengannya sebagai pemilik kepada pengecualian kesemua orang lain dan berniat berbuat demikian

jika keperluan berbangkit. Keadaan juga membangkitkan inferens bahawa perayu-perayu mempunyai niat bersama untuk mengedar dadah berikutan pelan yang telah dirancangkan terlebih dahulu dan mereka tidak berada di rumah tersebut untuk menggunakan dadah tersebut untuk diri mereka sendiri (lihat perenggan 28 & 31).]

Notes

For a case on proof of case beyond reasonable doubt, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 5079.

Cases referred to

Ang Kian Chai v PP [2012] 4 MLRA 456, CA (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Ibrahim Mohamad & Anor v PP [2011] 4 CLJ 113, FC (refd)
Mahbub Shah v King Emperor AIR 1945 PC 118, PC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Lai Ah Bee [1974] 2 MLJ 74 (refd)
Zulfikar bin Mustaffah v PP [2001] 1 SLR 633, CA (refd)

Legislation referred to

Criminal Procedure Code s 112
Dangerous Drugs Act 1952 ss 2, 37(d)
Penal Code s 34

Appeal from: Criminal Trial No 45–73 of 2004 (High Court, Kuala Lumpur)

Baljit Singh Sidhu (Shukor Baljit & Partners) for the first and third appellants.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the second appellant.

Clement Skinner JCA (delivering judgment of the court):

[1] We had earlier heard and dismissed the appeals of Mazlani bin Mansor ('first appellant'), Mohd Sharif bin Mohd Sahoji ('second appellant') and Hamdan bin Mohd Kafiah ('third appellant'). These are our reasons for doing so.

[2] The appellants were charged with trafficking in dangerous drugs, namely, 108,796g of cannabis. The charge against them reads:

> Bahawa kamu bersama-sama pada 17 Ogos 2003 jam lebih kurang 1.00 pagi, di Lot 445B-47A(2), Pintasan Raja Muda 4, Kampong Baru, Kuala Lumpur, telah dengan niat bersama mengedar dadah berbahaya iaitu 108, 796 grams cannabis. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dibaca bersama seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE BRIEF FACTS

[3] The evidence adduced in the case for the prosecution was that on 17 July 2004, on receiving information Supt S Batumalai a/l R Suppiah (PW4) led a police party to raid the house stated in the charge. Upon arrival at the house at about 12.58am, it was SP4's evidence that he knocked on the door, identified himself as *Polis* and immediately effected a forced entry into the house by kicking open the door.

[4] Upon entering the house, PW4 said he saw three male Malays ('the appellants') in the kitchen area, two of whom were standing and another was seated. There was also a Malay lady Na Yusoh ('PW10') the wife of first appellant) who was standing near the door to the second room in the house. All four persons were arrested. According to PW4 when the arrest was effected one of the persons put up a struggle. A search was made. At the place where the three appellants were, PW4 said he found the following:

(a) four red plastic bags, which upon examination, contained compressed slabs. In two of the plastic bags were four black plastic bags each containing five compressed slabs, making a total of 20 slabs. Inside a third plastic bag SP4 found a black plastic bag containing six compressed slabs and inside the fourth plastic bag was another black plastic bag containing three compressed slabs. All the compressed slabs were suspected to be cannabis;

(b) an empty sugar sack was found besides two sugar sacks stacked one on top of the other. Both the sacks were tied with raffia string. Each sack contained 28 compressed slabs suspected to be cannabis, making a total of 56 slabs. At the same spot PW4 also found two white plastic bags containing one empty plastic bag each; and

(c) one sugar sack which was tied with raffia string, leaning against the bathroom wall. Inside it were 29 compressed slabs suspected to be cannabis.

[5] PW4's evidence relating to the recovery of the compressed slabs is substantially supported by the evidence of Det/Sjn Zaini bin Hussin (PW6). All the compressed slabs that were seized were sent to the Chemistry Department for analysis and confirmed by Puan Halimah bt Rahim (PW3) to be cannabis, a dangerous drug listed under s 2 of the Dangerous Drugs Act 1952. PW3 testified that the cannabis weighed in total 108,796g.

[6] At the trial (PW10) the wife of the first appellant gave evidence for the prosecution. It was her evidence that the first appellant, she and four children lived in the house. PW10 said three persons had keys to the house, namely the

first appellant, herself and one other person that is, the first appellant's friend whose name she did not know but who worked for the first appellant.

[7] According to PW10, on the night of the incident, she had left the house at about 8 pm to go to the night market with two of her children, leaving her two elder children in the house. On returning to the house at about 9pm PW10 said she saw 'barang-barang dalam guni berbentuk 4 segi, saya tak tahu apa-apa'. PW10 said after she fed her children she went to sleep.

A PRIMA FACIE CASE

[8] On the evidence outlined above the learned High Court judge found that a prima facie had been established against the appellants and called them to enter their defence to the offence charged.

[9] The appellants gave evidence on their own behalf under oath. The first appellant's defence was that on the night in question he was returning home at about 11pm after closing his fried chicken business when he met the second and third appellants who invited him to join them for a steak at a nearby restaurant which he agreed to do but persuaded the second and third appellants to go to his house first to wait for him while he changed and got himself ready. The first appellant said on arriving home, the second and third appellants began to watch television while he proceeded to the kitchen to take a bath when the police came and raided the house. The first appellant also maintained that apart from his wife, his Indonesian worker named Suratman had a key to the house. The first appellant further said that when they were arrested, the second and third appellants were sitting in the hall and were not in the kitchen.

[10] The second appellant's defence was that at about 11pm on 16 August 2003, he went to the third appellant's house to invite the latter to go out to eat. On their way to a steak house they happened to meet the first appellant who agreed to join the second and third appellants. So they all went to the first appellant's house to wait for him while the latter got ready. While waiting the second and third appellants sat in the hall watching television when the police raided the house. The second appellant said he was arrested in the hall and then brought to the kitchen, when he saw the several sacks which were tied. In essence the second appellant's defence is that he was a visitor to the first appellant's house and had no knowledge of the cannabis in the house.

[11] The third appellant's defence was that on the night in question, the second appellant came to invite him to go out to eat which he agreed to do. Then they met the first appellant who also agreed to go with them to eat but invited them to his (first appellant's house) to wait for him while he got himself ready. The third appellant said that while waiting he and the second appellant

were seated in the hall watching television when the police raided the house. After their arrest they were taken to the kitchen where he saw the sacks, but he did not know what was in the sacks.

THE HIGH COURT DECISION

[12] At the conclusion of the trial the learned High Court judge found that the appellants had not raised a reasonable doubt on the prosecution's case, which the learned judge found had been proved beyond reasonable doubt. The appellants were each accordingly convicted of the offence charged and sentenced to death.

THIS APPEAL

[13] On behalf of the appellants it was contended before us that in convicting the appellants, of the offence charged the learned High Court judge had erred in law and fact in failing to fully consider and appreciate that there was a lot of evidence to show that third parties, such as the worker of the first appellant named Suratman as well as PW10 the wife of the first appellant had access to the house and hence to the kitchen as well where the drugs were found by the police.

[14] Thus it was pointed out that in her evidence in chief PW10 had said at p 137 (RA) Vol 1):

> Ini adalah rumah 3 tingkat, rumah saya yang bawah sekali. Di atas ada jiran-jiran. Dalam rumah saya ada 2 bilik. Saya ada dapat 3 kunci; saya satu, suami satu dan kawan suami yang kerja dengan dia.

And at p 140 RA Vol 1, PW10 said in cross-examination:

> kunci satu lagi dipegang oleh kawan dia yang selalu datang ke rumah itu, nama dia tak ingat, sama ada ada salinan kunci-kunci lain saya tak pasti.'
>
> S: Seorang lagi yang kunci ketiga itu selalu bawa kawan-kawan ke rumah?
>
> A: Ya, dia angkat barang berniaga suami saya

And at p 141 RA Vol 1, PW10 said in cross-examination:

> Ya, ramai orang yang datang ke rumah ini (orang yang pegang kunci ketiga ini), kawan-kawan lain suami, tiada tinggal di rumah tersebut, pemilik kunci ketiga itu bebas keluar masuk ke rumah bila-bila masa.

[15] It was also contended on behalf of the appellants that PW10 was arrested on the night in question and the evidence showed that PW10 had been in the house with the drugs for about three hours, whereas the appellants were

arrested soon after they came back to the house. Thus, it was pointed out that at p 137 RA Vol 1, PW10 had said in evidence in chief that:

> Pada petang 17.8.2003 saya dan anak pergi ke pasar malam iaitu anak kecil 2 orang, dalam pukul 8 malam lebih; pasar malam di Lorong Raja Musa 6, saya berjalan kaki ke sana. Sebelum keluar 2 anak besar saya ada di rumah, tiada orang lain lagi; saya balik jam 9.00 lebih malam. Masa itu 2 anak saya yang besar ada. Suami belum balik lagi masa itu.

And at p 138 RA Vol 1, PW10 said in her evidence in chief:

> Lepas balik daripada pasar malam, saya nampak barang-barang dalam guni berbentuk 4 segi, saya tak tahu apa-apa. Saya lepas bagi anak-anak makan saya pun tidur.

[16] Based on the foregoing evidence, it was contended on behalf of the appellants that the learned High Court judge erred in law and fact when he came to a finding that the appellants were in possession of the cannabis, even though third parties had access to the house.

[17] According to the appellants, to prove possession against them the prosecution must exclude the worker Suratman and PW10 herself as persons from having possession of the cannabis. In support the decision of the Court of Appeal in *Ang Kian Chai v Public Prosecutor* [2012] 4 MLRA 456 which followed the Federal Court decision in *Ibrahim Mohamad & Anor v Public Prosecutor* [2011] 4 CLJ 113 was cited.

[18] In *Ang Kian Chai v Public Prosecutor*, the evidence showed that the appellant there was not alone in the house when the police party raided it. A person called Chen Jing and a child of about four years old were also inside the house. The Court of Appeal held that it was wrong for the High Court to invoke the presumption under s 37(d) of the Dangerous Drugs Act to find the appellant there in possession of the opium in the house, without excluding Chen Jing from having custody or control of the raw opium at the material time. The Court of Appeal opined that this exclusion could only be achieved if the prosecution called Chen Jing as a witness or if the prosecution tendered Chen Jing's s 112 statement.

[19] We do not agree with the appellants contentions. In our judgment the prosecution had discharged its obligation to exclude PW10 from possession of the cannabis in question, while for Suratman no such obligation arose.

[20] As far as PW10 is concerned, the prosecution did call her to give evidence and from her evidence it is clear to us that she had nothing to do with the drugs and was not in possession of it. It was her evidence that when she left

the house, the drugs were not there. On her return she said she did see the four sacks in the kitchen but did not examine them, know anything about them or who they belonged to. PW10 said on returning home she fed the children and then went to sleep. It was only on hearing the door of the house being kicked that she came out of her room and saw the police inside. PW10's evidence on the matter was not challenged. It was also never put or suggested to her or to any of the police witnesses by the defence that she had placed the four sacks in the kitchen and had custody of them. We accordingly find that there is no evidential basis to suggest or even infer that PW10 had possession of the cannabis found in the kitchen of the house.

[21] As regards Suratman, the evidence shows that PW10 did not identify him as the person having a key to the house. All PW10 said was that the first appellant's worker had a key to the house. Further, it was not put to any of the police witnesses that the worker being referred to was Suratman or that Suratman had access to the house or that Suratman had placed the drugs there or had possession custody and control of the drugs found in the kitchen. Even when PW10 was being cross-examined, she was not asked about Suratman, although she was questioned about a person having a third key to the house. It was only after the prosecution closed its case and while the first appellant (DW3) was giving evidence that the name Suratman surfaced. So too the fact that he is an Indonesian. The first appellant also admitted in his cross-examination (at p 178 RA Vol 1) that he had never informed the police about Suratman.

[22] Given the fact that Suratman's identity had been held up the sleeves of the first appellant, so to speak, until the defence case was called, we do not see on what basis it can be submitted on behalf of the appellants that the prosecution ought to have called Suratman so as to exclude him from possession of the drugs in the house. Even further still the evidence of PW10 shows that when she left the house at about 8pm that night, the four sacks were not in the house but when she returned at about 9pm, she noticed the four sacks in the kitchen. It will be recalled that the first appellant gave evidence that he worked till about 11pm that night. It will also be recalled that PW10 said it was the first appellant's worker (with the key) who came to the house to ambil barang-barang berniaga. The first appellant had also said in his evidence in chief at p 170 RA Vol 1 that: *Pembantu saya bernama Suratman … Saya berikan kunci sebab kalau isteri tiada di rumah dia boleh masuk untuk mengambil barang-barang di rumah*. But there is absolutely no evidence given by the first appellant or from any other source that on the night in question, between 8pm and 9pm Suratman had been sent to the first appellant's house for any purpose whatsoever.

[23] We therefore find that on the facts disclosed in this case, the contention

of the appellants that the prosecution ought to have excluded Suratman from possession of the drugs found in the house is not sustainable.

[24] It was next contended on behalf of the appellants that the learned judge had misdirected himself that the appellants were in possession of the cannabis found in the kitchen as he said (at p 202 RA Vol 2):

> Keadaan dan fakta di atas menguatkan kes pendakwaan bahawa tertuduh-tertuduh sememangnya mempunyai kawalan dan pemilikan ke atas dadah-dadah tersebut dan di situ juga timbulnya pengetahuan mereka ke atas dadah tersebut bila mana pada malam serbuan ketiga-tiga tertuduh telah dijumpai bersama-sama dadah-dadah tersebut yang berada di hadapan mereka.

[25] It was submitted on behalf of the appellants that at its highest, the appellants were close to the cannabis but mere proximity alone is insufficient to fasten knowledge on the part of the appellants, let alone custody, control and possession. It was also contended on behalf of the appellants that the learned judge failed to appreciate that (a) the various slabs of cannabis were not left in the open, visible to the naked eye but were in fact concealed in plastic bags and in sugar sacks that were tied with raffia string; (b) that there was no evidence led by the prosecution to show any overt act on the part of the appellants to show they knew of the presence of the cannabis; (c) that in the case of the second and third appellants, they were not occupiers of the said house and mere presence alone is insufficient to infer knowledge (see *Public Prosecutor v Lai Ah Bee* [1974] 2 MLJ 74); (d) that there was no physical nexus between the appellants and the plastic bags or sugar sacks or cannabis and further, that no finger prints of the appellants were present in any of the incriminating items nor was there any evidence that they had touched the incriminating items.

[26] While we agree with the general proposition that mere presence or proximity to the impugned drugs is insufficient to fasten knowledge, custody and possession of the drugs, it is clear to us from a reading of his judgment that the learned judge found that this was not such a case. We agree with his finding for the following reasons.

[27] In *Chan Pean Leon v PP* [1956] 22 MLJ 237 Thomson J dealt with the issue of possession by quoting this passage from *Stephen's Digest* (9th Ed) p 304 where the word 'possession' as regards the criminal law is described as:

> A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

Thomson J went on to say:

> Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

[28] Reverting to the facts of this case, what were the circumstances surrounding the recovery of the cannabis in the house? As the learned Judge found, this was a case where at a very late hour of the night, behind the locked doors of the house which the police had to forcibly kick open to gain entry into, the three appellants were found in the presence of a very large quantity of cannabis, some of which were in plastic bags and some of which were in sugar sacks. In our judgment the correct irresistible inference to be drawn from the circumstances just mentioned is that the three appellants were so situated to the cannabis that they had the power to deal with the drugs as owners to the exclusion of all other persons and intended to do so in case of need.

[29] As regards the appellants denial of knowledge of what was in the plastic bags and the sacks, as the contents were not visible to the naked eye, we find this factor should not be given too much weight. As was said by the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633 at p 639 (which was referred to with approval by our Federal Court in *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337) such assertions should not be given too much weight 'otherwise drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings'. In our view the circumstances just mentioned by us show that the appellants' claimed ignorance of the drugs in the plastic bags and sacks is not credible.

[30] With regard to the absence of the appellants' finger prints on the incriminating items, we find that not much weight can be attached to such evidence either because in criminal law, a person may still be in possession of a movable thing without actually being in physical contact with it. What is required is that he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons which, as we found earlier, is the case here.

[31] It was next contended on behalf of the appellants that the learned judge misdirected himself when he ruled that common intention under s 34 of the Penal Code had been proved by the prosecution. The appellants complained that the learned judge erred for two reasons:

(a) he said at p 201 RA Vol 2 that:

> mempunyai motif yang sama iaitu untuk mengedar dadah tersebut.

According to the appellants the words motif yang sama or same motive is not known in law under section 34. In our judgment the choice of words by the learned judge may be wrong, but it did not cause a miscarriage of justice. Just two paragraphs earlier in his judgment the learned judge had used the right terminology when he said … pihak pendakwa perlulah membuktikan elemen niat bersama di bawah s 34 Kanun Keseksaan yang berbunyi: … Further, when the learned judge was considering the defence case, he said at p 211 para 57 RA Vol 2 'Pemakaian niat bersama di bawah s 34 Kanun Keseksaan telah dijelaskan di dalam banyak kes … and at p 212 para 58 RA Vol 2 where the learned Judge said: Begitu jugalah di dalam kes semasa di mana tiga-tiga tertuduh ditangkap … jelas menunjukkan satu tindakan untuk mencapai niat bersama mereka untuk mengedar dadah tersebut … We are satisfied therefore that the poor choice of words used by the learned judge on just one occasion did not lead him to misdirect himself on the law regarding an ingredient of the charge.

(b) The second reason was that the learned judge was wrong to find common intention proved when there was no evidence of the pre-requisite of pre-arranged plan in this case.

According to the appellants their presence in the house is insufficient to attract the element of common intention. We find no merit in this contention. In *Mahbub Shah v King Emperor* AIR 1945 PC 118 (Indian appeals 148) it was held that it is difficult if not impossible to prove by direct evidence the intention of an individual — in most cases it has to be inferred from his act conduct or other relevant circumstances of the case. What s 34 of the Penal Code requires is that the 'criminal act' is done by several persons in furtherance of the common intention of all. Here, the criminal act with which the appellants were charged for is trafficking in dangerous drugs. In our judgment the relevant circumstances from which a common intention of the appellants to traffic in dangerous drugs can be inferred, is that each of the appellants were found, late at night behind locked doors at the first appellant's house in the presence of a large quantity of cannabis. The cannabis was of such a large amount that the irresistible inference to be drawn is that each of the appellants was not present at the house to consume the drugs themselves but were there acting in concert pursuant to a pre-arranged plan to traffic in the drugs within the meaning of s 2 of the Dangerous Drugs Act 1952 ie keeping the drugs for supplying or distributing the same. We accordingly find the learned judge did not err in finding common intention proved against the appellants.

[32] It was lastly contended on behalf of the appellants that the learned trial judge had failed to consider that their defence had raised a reasonable doubt on the prosecution case. In particular it was argued that a reasonable doubt had been raised as to whether the appellants were found in the kitchen or whether they were found in the hall of the house when the police entered. According to learned defence counsel this doubt had arisen because there was conflicting evidence on the point given by the prosecution witnesses.

[33] Learned defence counsel pointed out that whilst PW4's evidence was that on entering the house all three appellants were found in the kitchen, PW6 gave contradicting evidence when he said the three appellants were found in the hall or front part of the house. Further, PW4 is alleged to have said that on entering the house he could see all three appellants in the kitchen, but this could not be so because the photographs admitted in evidence as exhs 'F' and 'G' show that you cannot see the kitchen from the front part of the house.

[34] Learned defence counsel also pointed out that SP4's evidence was that on entering the house he saw two appellants standing while one appellant was sitting. According to defence counsel, exhs P13 A and B ie photographs taken of the kitchen, show there are no benches in the kitchen, while the key to the sketch plan exh P 138 shows a settee in the hall. Therefore, according to learned defence counsel, this evidence supports the defence version that the appellants were in the hall and not the kitchen since the sketch plan shows the settee was in the hall and not the kitchen.

[35] Learned defence counsel also pointed out that whereas PW4 said that on entering the house he saw PW10 standing next to the second room, PW10 had in her evidence said that she was asleep in her room.

[36] We do not agree with the appellants' contentions. A reading of PW6's evidence in chief at p 97 RA Vol 1 shows that while PW6 said there were three male Malays at the front part of the house, PW6 went on to say 'pada masa serbuan itu tiga orang mereka di dapur, bahagian mereka berapa guni dipercayai dadah'. And in his cross-examination when it was put to PW6 that when the door of the house was opened the three appellants were in the hall, PW6 did not agree (see p 103 RA Vol 1). In his re-examination PW6 said that it was possible to see a little of the kitchen from the main door. We do not find PW6's evidence to have contradicted that of PW4 as to where the appellants were found when the police party entered the house.

[37] We also do not think that the fact that the sketch plan shows a settee in the hall means that the appellants version that they were in the hall and not the kitchen was more probable than the prosecution's version because it is not the evidence of PW4 that the two appellants who were seen seated, were sitting on a settee or bench. PW4 simply said they were seated which could mean that they were seated on the floor of the kitchen.

[38] With regard to PW10 having been seen by PW4 outside the second room, we see nothing in the point taken because it was PW10's evidence that it was when the police raided the house that she came out of her room. Therefore PW4's evidence on the point is not discredited.

[39] We accordingly find that none of the matters relied on by the appellants were capable of creating a doubt on the prosecution's case.

[40] It was for all the above reasons that we dismissed the appeals of the appellants. We affirmed the convictions and sentences of death imposed by the learned High Court judge.

Appeals dismissed and convictions and sentences confirmed.

Reported by Ashok Kumar